IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

DIAMOND T OF ARIZONA, INC., AN ARIZONA CORPORATION,
Plaintiff/Appellee,

v.

DANNY O. CLEARY AND ELNA M. CLEARY, HUSBAND AND WIFE,
Defendants.

KMS ENTERPRISES, LLC,
Proposed Intervenor/Appellant.

No. 2 CA-CV 2021-0139
Filed September 9, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV202000572
The Honorable David Thorn, Judge

AFFIRMED

COUNSEL

The Russell's Law Firm PLC, Sierra Vista
By D. Christopher Russell
Counsel for Plaintiff/Appellee

Hinderaker Rauh & Weisman P.L.C., Tucson
By Adam Weisman
Counsel for Proposed Intervenor/Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 KMS Enterprises LLC appeals from the trial court's order denying KMS's motion to intervene and affirming its prior default judgment foreclosing Danny and Elna Cleary's right to redeem a property tax lien as well as that of their successors of interest. KMS asserts the court erred by finding its motion to intervene untimely and by applying the default judgment to KMS, finding its right to redeem had been foreclosed. For the following reasons, we affirm the court's denial of the motion to intervene.

Factual and Procedural Background

¶2 In August 2020, Diamond T of Arizona Inc. acquired a tax lien on a property owned by the Clearys and, almost three months later, filed a complaint to foreclose the Clearys' right of redemption as to the lien.[1] After the Clearys failed to respond, Diamond T sought and obtained an entry of default against them. The trial court thereafter entered a default judgment in February 2021, foreclosing the Clearys' right to redeem, as well as that of "any and all unknown heirs/devisees of theirs, and any successors in interest of theirs," and ordering the Cochise County Treasurer to issue a deed conveying the property to Diamond T.

¶3 After the foreclosure action had been filed but before the entry of default or default judgment was entered, the Clearys sold the property to KMS. KMS was unaware that the tax lien foreclosure was pending. The proceeds from the sale included $7,460.08 to be directed to Cochise County

[1]The complaint was entitled, "Action to Quiet Title and to Foreclose on Tax Lien."

to satisfy delinquent taxes on the property, but KMS's title and escrow agent failed to remit the funds to Cochise County before the default judgment was entered. In March 2021, Diamond T notified KMS that it had apparently "been the victim of fraud," and asked KMS to execute a quit-claim deed to clear the title. KMS filed a motion to intervene in the foreclosure action in order to file a motion for relief from judgment and for a new trial.

¶4 The trial court denied the motion to intervene as untimely and noted that the default judgment had foreclosed the rights of KMS, as a successor of interest, to redeem the property taxes.[2] This appeal followed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(3). *See Musa v. Adrian*, 130 Ariz. 311, 314 (1981) (order denying motion to intervene appealable because, as applied to the intervenor, it determines the action and prevents an appealable judgment for or against him).

Discussion

Timeliness of Motion to Intervene

¶5 KMS first argues the trial court erred by finding its motion to intervene untimely. In our review, "we accept the allegations of the motion as true." *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, ¶ 9 (App. 2019). We will not disturb the court's ruling on the timeliness of a motion to intervene absent an abuse of discretion. *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, ¶ 5 (2000).

¶6 In a letter dated March 8, 2021, Diamond T informed KMS that its recently acquired property was the subject of a tax lien foreclosure judgment entered on February 19, 2021, and that the judgment had foreclosed its right to redeem. It therefore asked KMS to execute a quit-claim deed. On August 16, 2021, KMS filed a motion to intervene pursuant to Rule 24, Ariz. R. Civ. P., attaching as an exhibit a motion for relief from judgment and for a new trial that it sought to file if the trial court granted its motion to intervene.

[2]The trial court's order denying the motion to intervene stated that KMS should have known that "a lawsuit to foreclose their right to redeem the property taxes was pending."

¶7 Considering KMS's motion to intervene, the trial court noted that it came "nearly six months after [KMS] discovered that a judgment had been entered against the Clearys and that that judgment affected their interests." It therefore found that the motion was not timely filed. It further noted that KMS had other remedies available to be made whole, and that public policy favors the finality of judgments.

¶8 KMS contends the trial court erred in finding its motion to intervene untimely because it sought relief on the basis of fraud or misconduct pursuant to Rule 60(b), Ariz. R. Civ. P. *See* Ariz. R. Civ. P. 60(c)(1) (motions under Rule 60(b)(1)–(3) must be made within a "reasonable time—and . . . no more than 6 months after the entry of the judgment . . ."). [3] KMS therefore asserts that it "was legally entitled to six months in which to intervene" in order to file a motion for relief from judgment pursuant to Rule 60. Diamond T counters that KMS misapplies the law by applying Rule 60's timeliness principles to Rule 24. We agree.

¶9 The trial court appropriately considered the motion under Rule 24 timeliness principles, and because the court denied the motion to intervene, there was no need for it to consider the attached, but not yet filed, motion to set aside. *See State Farm Mut. Auto. Ins. Co. v. Paynter*, 118 Ariz. 470, 471 (App. 1978) (where motion to intervene was denied as untimely, court did not consider motion to set aside for fraud). KMS's contention that it had a six-month window to file its Rule 24 motion, because it sought to set aside judgment under Rule 60, is unsupported. [4]

¶10 Next, KMS argues that even assuming the trial court applied the correct standard to determine timeliness, the court erred in applying it because the status of the case did not change between the time KMS learned about the default judgment and the filing of the motion. Thus, there was

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[3]On appeal, KMS asserts it sought relief on the basis of fraud or mistake, citing Rule 60(b)(1), but its proposed motion sought relief on the basis of fraud or misconduct, and cited Rule 60(b)(3). The discrepancy does not affect our analysis because both subsections are subject to Rule 60(c)(1).

[4]Furthermore, KMS misreads Rule 60. A motion under Rule 60(b)(3) is time-barred after six months, but even if filed within six months, the motion must still be made within a "reasonable time." Ariz. R. Civ. P. 60(b)(3), (c)(1) (motion for relief from judgment for fraud, misrepresentation, or misconduct "must be made within a reasonable time—and . . . no more than 6 months after the entry of the judgment").

no evidence that Diamond T had been prejudiced by the delay. Diamond T responds that the court acted within its discretion, applying the correct standard to find that KMS's delay of more than five months without just cause made the motion untimely and prejudiced the parties.

¶11 Rule 24 permits intervention of right only upon the timely filing of a motion to intervene. Ariz. R. Civ. P. 24(a); *Brown*, 196 Ariz. 382, ¶ 5. Timeliness under Rule 24 is measured from the stage of the proceedings at which a potential intervenor was on notice of the need to intervene. *See Heritage Vill. II*, 246 Ariz. 567, ¶¶ 13-16. A trial court must assess the timeliness of a motion by considering the stage of the proceedings when the intervention is sought, whether the applicant could have attempted to intervene sooner, and most importantly, whether the delay in moving to intervene will prejudice the existing parties. *Brown*, 196 Ariz. 382, ¶ 5. It may also consider prejudice to the intervenor if intervention were to be denied. *See Zenith Elecs. Corp. v. Ballinger*, 220 Ariz. 257, ¶¶ 19-20 (App. 2009).

¶12 Post-judgment interventions are disfavored and "considered timely only in extraordinary and unusual circumstances." *Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 446 (App. 1989). A potential intervenor must act swiftly. *Compare Brown*, 196 Ariz. 382, ¶¶ 13-15 (untimely when party waited twenty-eight days to intervene, filing its motion fifteen days after judgment), *with Heritage Vill. II*, 246 Ariz. 567, ¶ 17 (motion to intervene timely when filed five days after settlement).

¶13 KMS filed its motion to intervene almost six months after it was on notice that judgment had been entered. And at no point did KMS explain its delay to the trial court.[5] With regard to prejudice suffered by the parties, KMS points out that it "remains in fee title to the Property, no treasurer's deed has been issued to Diamond T, and Diamond T has not incurred any costs apart from the purchase of the tax lien and its foreclosure." However, both parties note that Diamond T brought a quiet title action against KMS, which has presumably resulted in litigation costs and delayed finality for Diamond T. But the trial court apparently balanced

[5]On appeal, KMS explains that it had needed time to determine legal issues such as the scope and application of the tax lien statutes and the liability of its title and escrow agent, but it did not present this argument to the trial court, and therefore we do not consider it. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) (appellate review limited to record presented to trial court when making its ruling).

Diamond T's interest in finality against the potential prejudice to KMS. It noted, "Diamond T did nothing wrong" and "was just as surprised to learn that the property had been sold" and KMS "is not without remedies" to "protect [its] interests." Given that granting a post-judgment motion to intervene is reserved for exceptional circumstances, *Brown*, 196 Ariz. 382, ¶ 5, and that the court considered the potential prejudice to the parties, we cannot say the court clearly abused its discretion, *see Roberto F. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 45, ¶ 17 (App. 2013) (we do not substitute our judgment for that of the trial court in denial of motion to intervene).

Right to Redeem the Tax Lien

¶14 KMS next argues the trial court erred by entering a default judgment that foreclosed not only the Clearys' right to redeem but also that of "any successors of interest," and by subsequently finding the default judgment had foreclosed KMS's right to redeem.[6] Because KMS's motion to set aside judgment was never filed—it was merely an exhibit to the motion to intervene—it was not properly before the court. Thus, to the extent the court ruled that KMS was bound by the default judgment, such a determination was legally void, or a nullity. *Cf. Danielson v. Evans*, 201 Ariz. 401, ¶ 38 (App. 2001) (action taken by court lacking jurisdiction is void and a nullity). Furthermore, having denied the motion to intervene, the court had impliedly denied KMS permission to file its Rule 60 motion. *Cf. Liston v. Butler*, 4 Ariz. App. 460, 466 (1966) (court may grant intervention to nonparty directly affected by judgment that timely moves to set aside). KMS, as a nonparty, therefore lacked standing to raise the issues underlying its motion to set aside. *See Bechtel v. Rose*, 150 Ariz. 68, 71 (1986) ("a movant denied intervention is simultaneously denied party status"); Restatement (Second) of Judgments § 34(3) (1982) (non-party is not bound by res judicata).

Attorney Fees

¶15 Diamond T requests its attorney fees and costs on appeal pursuant to A.R.S. §§ 12-1103 and 12-349. We deny its request because KMS did not bring the appeal "without substantial justification," "solely or

[6]KMS noticed its appeal from the trial court's denial of its motion to intervene, and we are without jurisdiction to review the underlying default judgment. *See Sycamore Hills Ests. Homeowners Ass'n, Inc. v. Zablotny*, 250 Ariz. 479, ¶ 25 (2021) (no jurisdiction to review matters not included in notice of appeal); *see also Aloia v. Gore*, 252 Ariz. 548, ¶ 21 (App. 2022) (default judgment cannot be directly appealed).

primarily for delay or harassment," nor did it "[u]nreasonably expand[] or delay[] the proceeding." § 12-349(A). Furthermore, Diamond T does not indicate why § 12-1103 would be applicable to this appeal concerning a foreclosure of a right to redeem under A.R.S. § 42-18201, but regardless, in our discretion, we deny its request. *See* § 12-1103(B). We also deny KMS's request for attorney fees and costs on appeal, which was improperly raised for the first time in its reply brief. Ariz. R. Civ. App. P. 13(a)(8), (c) (opening brief must contain notice of party's intent to claim attorney fees).

Disposition

¶16 For the foregoing reasons, we affirm the trial court's ruling denying the motion to intervene on timeliness grounds. To the extent the order concluded that KMS's right to redeem had been foreclosed by the default judgment, such a determination was a nullity.